

Decision 04-03-024 March 16, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 M), a California corporation, and Starlink Logistics Inc., a Delaware corporation, for an order Authorizing the Sale and Conveyance of a Certain Parcel of Land in San Mateo County Pursuant to Public Utilities Code Section 851.

Application 03-05-038
(Filed May 29, 2003)

**DECISION GRANTING APPROVAL UNDER PUBLIC
UTILITIES CODE SECTION 851 FOR SALE AND
CONVEYANCE OF REAL PROPERTY**

We grant the Application of Pacific Gas & Electric Company (PG&E) and Starlink Logistics Inc. (Starlink) for approval of the sale and conveyance of a certain parcel of land in San Mateo County from PG&E to Starlink under Public Utilities Code Section 851,¹ and defer considering the allocation of PG&E's gain on sale to an upcoming rulemaking considering gain on sale issues.

Background

Starlink is the owner of a parcel of land (Starlink Parcel) adjacent to the PG&E "Cooley Landing" substation in the City of East Palo Alto (PG&E Parcel). A predecessor corporation to Starlink operated a herbicide and pesticide manufacturing plant on the Starlink Parcel from 1926 to 1970. Arsenic runoff from the manufacturing plant contaminated both the Starlink Parcel and the

¹ All statutory references are to the Public Utilities Code unless noted otherwise.

PG&E Parcel. The California Regional Water Quality Control Board, San Francisco Bay Region (RWQCB) has ordered Starlink to abate the contamination on both Parcels. Starlink has complied with the order in respect of the Starlink Parcel, and now seeks to purchase most of the PG&E Parcel in order to complete the task of abating the contamination. The portion of the PG&E Parcel to be sold to Starlink pursuant to this application is hereafter referred to as “the Site.”

PG&E no longer needs to own the Site in fee for utility purposes.

In connection with the presence of hazardous materials either on or affecting the site, Starlink has agreed to execute a Release and Indemnity Agreement containing a general release waiving and relinquishing any and all rights it may have under Section 1542 of the California Civil Code, which provides: “A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.” Based on their agreement and this general release, PG&E represents that the parties do not expect any claim for environmental damage to affect it or its ratepayers after the close of escrow.² (Application, p. 12.)

The Cooley Landing substation is approximately 7.27 acres in total. The Site consists of 3.38 acres of non-tidal-marsh land and does not include any of the

² However, in the event the Environmental Protection Agency (EPA) requires lead cleanup in the Northeast Quadrant of the property where testing indicates contamination due to elevated levels of arsenic and lead, PG&E has agreed to reimburse Starlink for certain defined costs of such lead cleanup, notwithstanding the provisions of the Release and Indemnity Agreement. PG&E will also reimburse Starlink for any mandated PCB-related remediation on the Site. (Application, p. 13.) The application does not state that such costs would be borne by shareholders.

land on which the substation stands. As part of the transaction, Starlink will grant PG&E a permanent easement for the power lines that cross the Site.

Procedural History

On May 29, 2003, PG&E and Starlink filed their joint application, seeking authorization from the Commission for the sale and conveyance of the Site to Starlink. The application is made under Section 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise dispose of or encumber³ the whole or any part of its property that is necessary or useful in the performance of its duties to the public.⁴ Questions of whether a property is

³ As the Commission previously stated: “The language of Section 851 is expansive, and we conclude that it makes sense to read “encumber” in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility’s plant, system, or property.” (D.92-07-007, 45 CPUC2d 24, 29.)

⁴ Section 851 reads:

No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. Nothing in this section shall prevent the sale, lease,

Footnote continued on next page

necessary or useful for the provision of utility service are properly brought before the Commission under Section 851.

On July 2, 2003, the Office of Ratepayer Advocates (ORA) filed a protest of the proposed sale. ORA's protest was limited to the single issue of the proper accounting treatment of \$52,896 of after-tax gain on sale that will be realized by PG&E. In the application, PG&E indicated that it would treat the gain on sale as accruing in its entirety to PG&E shareholders pursuant to regulations of the Federal Energy Regulatory Commission (FERC). The ORA protest argued that the proper accounting treatment would allocate the gain on sale to PG&E ratepayers pursuant to regulations of this Commission. On July 9, 2003, assigned Administrative Law Judge (ALJ) Karl Bemederfer ruled that PG&E and ORA should submit briefs on two issues: (a) Which body of regulatory law, state or Federal, governs the accounting treatment of the anticipated gain on sale? And (b) Under the applicable body of law, what is the proper accounting treatment? On July 14, 2003, PG&E filed its reply to the ORA protest. On August 12, 2003, the parties submitted a joint statement of stipulated facts and an accompanying joint motion requesting approval of the joint statement of stipulated facts. On August 13, 2003, both ORA and PG&E filed briefs in response to ALJ

encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

Bemesderfer's July 9th ruling. On August 14, 2003, ALJ Bemesderfer granted the joint motion.

Analysis and Action

We grant PG&E's and Starlink's request under Section 851 to sell and convey the Site. The basic task of the Commission in a Section 851 proceeding is to determine whether the transaction serves the public interest: "The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers." (D.02-01-058.) We have reviewed the proposed transaction and find it does not interfere with PG&E's operation or affect its ability to provide service to its customers. The Site is excess to the utility's needs. The easements to be granted to PG&E in connection with the sale of the Site will guarantee PG&E unfettered access to the substation and the power lines. The money to be paid for the Site, and the removal of the Site from the rate base, will financially benefit the ratepayers. Abatement of the contamination on the Site is a productive purpose. Accordingly, the transaction is in the public interest and should be approved.

Environmental Review

In its application, PG&E requests that the Commission find the proposed sale to be exempt under California Environmental Quality Act (CEQA) because the buyer does not propose any change in use of the property following the sale and thus, the sale would not cause any direct or reasonably foreseeable indirect changes to the environment. (14 Cal. Code Regs., Sections 15060(c)(2), 15061(b)(3).) PG&E's CEQA discussion does not suggest how the Commission should address the issue of direct or reasonably foreseeable changes to the

environment which will result from the environmental cleanup that buyer would undertake following the sale, pursuant to the order of the RWQCB.

CEQA (Public Resources Code Section 21000 et seq.) applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities.” (Title 14 of the California Code of Regulations, hereafter CEQA Guidelines, Section 15002.)

Because the Commission must issue a discretionary decision (i.e., grant Section 851 authority) without which the proposed activity cannot proceed, and because the activity has the potential to result in either a direct physical change in the environment or a reasonably foreseeable indirect physical change to the environment (CEQA Guideline Section 15378), the application is subject to CEQA and the Commission must act as either a lead or responsible agency under CEQA. The lead agency is the public agency with the greatest responsibility for supervising or approving the project as a whole. (CEQA Guidelines Section 15051(b).) A responsible agency is required to consider the environmental consequences of a project that is subject to its discretionary approval and in particular, to consider the lead agency’s environmental documents and findings before acting upon or approving a project. (CEQA Guideline Section 15050(b).) In this case, the RWQCB is the lead agency and the CPUC is a responsible agency.

We agree that if the buyer does not propose any change in use of the property that would be conveyed under the proposed sale, we can be reasonably certain that there will be no direct or reasonably foreseeable indirect change in the environment based on use. Accordingly, the activity is exempt from CEQA

review pursuant to CEQA Guidelines Sections 15060(c)(2) and 15061(b)(3).

Furthermore, CEQA Guidelines Section 15530 provides a categorical exemption from CEQA review for minor activities to mitigate or eliminate hazardous waste or hazardous substances. Thus, the remedial environmental cleanup on the property is also exempt from our CEQA review.

Gain on Sale Proceeds

With regard to the question of accounting for the gain on sale, the parties agree that the basic issue for decision is whether the Site is “transmission property” subject to FERC jurisdiction or non-transmission property, subject to Commission jurisdiction.

The joint statement of stipulated facts (Joint Statement) contained, in relevant part, the following information:

1. The purchase price of the Site is One Hundred Thousand Dollars (\$100,000).
2. The original cost and net book value of the Site is approximately Ten Thousand Five Hundred Seventy-Nine Dollars (\$10,579).
3. Ratepayers did not contribute to the initial cost of acquiring the Site.
4. PG&E has not recovered the initial cost of the Site from ratepayers through depreciation expense or any other ratemaking mechanism.
5. The Original Parcel, of which the Site is a part, was recorded in rate base in 1953.
6. The PG&E Parcel, including the Site, is classified as an electric transmission asset in PG&E's electric transmission rate base.

7. The after-tax gain on sale is estimated to be Fifty-Two Thousand Nine Hundred Eighty-Six Dollars (\$52,986).

The Joint Statement establishes that ratepayers did not pay to acquire the Site and have not paid for the Site since PG&E acquired it; and that PG&E has treated the PG&E Parcel, including the Site, as transmission property subject to FERC ratemaking and FERC accounting rules.

Consequently, PG&E argues that costs related to this property have been recovered through FERC ratemaking for transmission service, that the property was placed into the transmission rate base pursuant to FERC criteria governing the classification of such property, and that the Commission should recognize the property as properly classified (as a transmission asset) under FERC accounting rules. In this case, PG&E argues that the FERC USOA requires that the gain on sale proceeds be assigned to shareholders.

ORA argues that the Commission should base its determination of the appropriate regulatory regime on the relationship of the Site to the remainder of the PG&E Parcel after completion of the sale. At that point, ORA argues, the Site will no longer retain its character as a transmission asset subject to FERC jurisdiction but will be excess real property subject to Commission jurisdiction.

In addition, ORA contends that FERC jurisdiction over transmission ratemaking does not preempt our jurisdiction over ratemaking issues related to the disposal of utility property. ORA states that the gain on sale should be allocated to ratepayers, because the property has been part of PG&E's rate base and ratepayers have borne the costs of maintaining the property over the years.

The Commission will be initiating a rulemaking to address the allocation of a utility's gain on sale between shareholders and ratepayers on a broad, policy basis in the near future, and we believe that it is more appropriate to consider the

ratemaking issues raised by the parties in that forum. We therefore defer our decision on the allocation of PG&E's gain on sale to the upcoming gain on sale rulemaking. The parties may wish to pursue in that forum the additional issues raised in their briefs regarding the merits of allocating all or part of the gain to ratepayers who contributed to the property by paying property taxes and revenue requirements over a 50-year period, and who will bear any additional environmental costs not covered by the Release and Indemnity Agreement.

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Karl J. Bemesderfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The RWQCB has ordered Starlink to abate arsenic contamination on the Site.
2. In order to carry out the order of the RWQCB, Starlink needs to acquire the Site from PG&E.
3. PG&E no longer needs to own the Site in fee for utility purposes.
4. Starlink will grant PG&E permanent access easements to the Cooley Landing Substation and the transmission towers and lines that cross the Site; therefore, the proposed sale will not affect the availability of adequate service to the public at reasonable rates because PG&E has reserved easements as necessary to carry out utility functions.
5. The RWQCB is the lead agency for environmental review under CEQA.

6. The Commission is a responsible agency for environmental review under CEQA.

7. Buyer does not propose any change in use of the property following the sale.

8. Buyer will conduct remedial environmental cleanup on the property pursuant to RWCQB order.

9. The parties have entered into a Release and Indemnity Agreement designed to protect PG&E and its ratepayers from any claim of environmental damage associated with the Site, except for (1) discrete costs related to lead cleanup in the Northeast Quadrant, if required by the EPA at some future date, and (2) any future mandated remediation of PCB impacts on the Site.

10. CEQA Guidelines Sections 15060(c)(2) and 15061(b)(3) provide an exemption from CEQA review for projects where it can be seen with reasonable certainty that there will be no direct or reasonably foreseeable indirect change in the environment.

11. CEQA Guidelines Section 15330 provides an exemption from CEQA review for minor activities to mitigate or eliminate hazardous waste or hazardous substances.

12. The purchase price of the Site is One Hundred Thousand Dollars (\$100,000).

13. The original cost and net book value of the Site is approximately Ten Thousand Five Hundred Seventy-Nine Dollars (\$10,579).

14. Ratepayers did not contribute to the initial cost of acquiring the Site.

15. PG&E has not recovered the initial cost of the Site from ratepayers through depreciation or any other ratemaking mechanism.

16. The Original Parcel, of which the Site is a part, was recorded in rate base in 1953, and has not been taken out of rate base.

17. The PG&E Parcel, including the site, is classified as an electric transmission asset in PG&E's electric transmission rate base.

18. The after-tax gain on sale is estimated to be Fifty-Two Thousand Nine Hundred Eighty-Six Dollars (\$52,986).

Conclusions of Law

1. Authorizing the sale of the Site to Starlink is in the public interest.
2. The proposed sale is exempt from CEQA review pursuant to CEQA Guidelines Sections 15060(c)(2), 15061(b) (3) and 15530.
3. Although the Commission has jurisdiction over transfers of utility property under Section 851, transmission property is generally subject to FERC jurisdiction for ratemaking purposes.
4. Our decision on the allocation of PG&E's gain resulting from the sale of the property is deferred to the Commission gain on sale rulemaking, to be initiated in the near future.
5. This decision should be effective today in order to allow the property to be conveyed to Starlink expeditiously.

O R D E R

IT IS ORDERED that:

1. The joint application of Pacific Gas and Electric Company (PG&E) and Starlink Logistics Inc. for authority to sell and convey approximately 3.38 acres of land in San Mateo County to Starlink Logistics Inc. is approved.

2. PG&E shall allocate the gain resulting from the sale of the property as determined in the upcoming Commission gain on sale rulemaking. In the meantime, neither shareholders nor ratepayers shall receive the proceeds from the sale. Rather, the proceeds shall be held by PG&E in its Real Property Gain/Loss on Sale Memorandum Account, and shall accrue interest until this Commission determines the appropriate allocation of the gain on sale for this transaction.

3. This proceeding is closed.

This order is effective today.

Dated March 16, 2004, at San Francisco, California.

MICHAEL R. PEEVEY

President

CARL W. WOOD

LORETTA M. LYNCH

GEOFFREY F. BROWN

SUSAN P. KENNEDY

Commissioners